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FEDERAL COMMUNICATIONS COMMISSION **AUG 3 0 1993**
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition for Rulemaking to Determine the
Terms and Conditions Under Which Tier 1
LECs Should be Permitted to Provide
InterLATA Telecommunications Services

R.M.-8303

COMMENTS OF WILTEL, INC.**I. INTRODUCTION**

WilTel respectfully submits the following comments in response to the above captioned petition of certain Bell Operating Companies ("BOCs") for a rulemaking to establish the terms and conditions under which Tier 1 local exchange carriers ("LECs") should be allowed to enter the interLATA telecommunications market. WilTel submits that further inquiry will demonstrate that a rulemaking at this time is premature. However, should the Commission choose to devote its limited resources to this issue, it should proceed by issuing a detailed notice of inquiry to refine the input of commenting parties.

Unfortunately, the BOC Petition grossly understates the complexity of the undertaking both in terms of the proper scope of any rulemaking as well as the level of monitoring

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required to ensure LECs do not engage in anticompetitive conduct. Even an initial exploration of the proper regulatory environment for BOC entry into the interLATA market would require the Commission to embark upon not only a reexamination of complex issues, but also an exploration of an unprecedented level of federal control of the telecommunications industry.

Rather than attempting a detailed discussion of these complexities, WilTel's comments will indicate the general contours of the issues that any rulemaking proceeding must consider. As an initial point, WilTel notes the courts and not the Commission have jurisdiction over this matter.¹ Although the Petition characterizes this rulemaking as a chance for the Commission to "retake the policy initiative,"² at best it would serve as a necessary, but obviously not sufficient, step for BOC entry into the interLATA market.³

¹At least to the extent the proposed rules would apply to the BOCs or GTE.

²Petition at ii.

³See, United States v. Western Electric Co., 900 F.2d 283, 301 (D.C. Cir. 1990) (noting Department of Justice representation that anticompetitive concerns over BOC entry cannot be addressed without FCC regulatory action). Of course congressional action could even further limit the Commission's ability to direct this issue.

II. THE PETITION UNDERESTIMATES THE SCOPE OF THE INQUIRY NECESSARY TO DETERMINE THE CONDITIONS UNDER WHICH ENTRY INTO THE INTERLATA MARKET SHOULD BE ALLOWED

That the scope of a proper inquiry into the question of BOC entry into interLATA services is enormous is beyond question. Considerable time and effort will be required to adequately examine even the basic issues raised. Those elemental issues include revising access and interconnection rates and regulation, greatly expanding the reach of federal regulation, addressing the concerns raised when a monopolistic firm is allowed to vertically integrate into other markets, and crafting a coherent regulation of local access where the line between local and long distance service has collapsed. The Petition, however, suggests that the simple extension of existing regulatory measures, and perhaps some minor additional steps, would suffice to protect against anticompetitive conduct and damage to the interLATA market,⁴ and makes only the most general reference to other areas that must be explored.

A. Regulatory Boundaries

Perhaps the most glaring omission of the Petition is its failure to consider that BOC entry into the interLATA market collapses the distinction between local and long distance services. In the face of such change, it is by no means

⁴Petition at 25-29.

obvious that the local regulatory structure can or should remain unchanged.

A cornerstone of the safeguards suggested by the petition is its representation that BOCs could pay for access on an imputed, nondiscriminatory basis.⁵ However, this proposal entirely ignores the absence of a meaningful basis for determining where local service ends and access for interexchange service begins for the BOC. It is certainly incoherent to refer to a LEC's "point of presence", as that term is presently defined, and yet that concept is essential to the pricing of access. Some of the hazards of this lack of definition can be seen in the state experience with extended area service ("EAS") plans. For example, "optional" EAS plans that allow the LEC to offer local service at a low distance-sensitive rate, as opposed to a flat rate for the entire area, have the effect of extending the local monopoly since interexchange carriers, still required to pay the substantially higher access charges, cannot compete with the "local" EAS rate.⁶ WilTel does not suggest that regulation could not establish workable boundaries. However, where and how those boundaries should be drawn is not clear.

⁵Petition at 28.

⁶It is for this reason that the Justice Department is opposed to such plans. See, e.g., Response of the United States in Opposition to GTE's Motion to Provide InterLATA Extended Area Service in Ohio, United States v. GTE Corp., Civil Action No. 83-1298 HHG, at 5 (D.D.C. Nov. 13, 1992); United States v. Western Elec. Co., 569 F.Supp. 990, 1002 & n.54 (D.D.C. 1983) (denying waiver for "optional" EAS plans).

Indeed, with the merging of the intra- and interLATA markets there is a strong argument that the Commission should preempt, or at least examine the possibility of preempting, state regulation of intraLATA services. The Supreme Court has stated that the Communications Act's dual federal/state regulatory system must give way to federal authority where separation of federal and state jurisdiction is not possible or where state regulation would negate federal regulation.⁷ If local exchange monopolies are permitted to be vertically integrated into the interLATA market, the notion that intrastate intraLATA services can be regulated by the individual states without negating federal policy becomes highly suspect. In particular, without uniform federal action at the local level BOCs will be uniquely positioned in many local markets to offer vertically integrated services. Conferring such a clear additional advantage upon the dominant local carrier is an invitation to discrimination and injury to competition.⁸

However, as discussed below, and as the Petition implicitly acknowledges, the prospect of local competition

⁷See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375-376 n.4 (1976). The Commission should seriously consider, at the appropriate time, referring preemption and related issues to a Federal-State Joint Board.

⁸The Commission should also examine whether it should preclude BOCs entering the interLATA market from using their preexisting interLATA facilities to provide interLATA service. This would prevent BOCs which have built interLATA "internal" networks at ratepayer expense from benefiting from any improper and premature construction.

cannot be relied upon to do the work of regulation. In its comments on the Ameritech Petition,⁹ WilTel demonstrated that opening the local loop to potential competition, while failing to adopt adequate regulatory safeguards, will ensure that the promise of local competition will remain unfulfilled and thus insufficient to check against anticompetitive abuses. Even with safeguards, and a theoretically open local market, the duration and extent of the local monopoly likely to persist is uncertain.¹⁰ Clearly the Commission's access/transport initiatives to create the potential for increased competition in the local loop do not justify interLATA relief.¹¹

B. Regulatory Safeguards Against Monopoly Abuses

The Petition greatly underestimates the complexity of the proper regulatory safeguards required to allow BOC interLATA entry. Underpinning this failing is the Petition's basic assertion that the local monopoly is now only a "residual core" that "will not survive much longer",¹² an assertion

⁹Comments of WilTel, Inc. on Petition of the Ameritech Operating Companies for Declaratory Ruling and Waiver to Establish a New Regulatory Model for the Ameritech Region, DA 93-481, at 3-6 (filed June 11, 1993).

¹⁰See, e.g., id. (discussing lack of workable resale and facilities-based competition).

¹¹But see Petition at 24. As WilTel has noted previously, technical and economic barriers severely restrict the near term potential for switched access competition. See, e.g., Reply Comments of WilTel, Inc., CC Docket No. 91-213, 16-18 (filed Mar. 19, 1993).

¹²Petition at 24.

that appears to confuse potential and actual competition.¹³ While competitive access providers have created a nascent competitive fringe, and a flurry of acquisitions in the telecommunications industry have occurred, BOCs remain essentially monopolists.¹⁴

In this context, the Petition's suggestion that BOCs should be classified nondominant¹⁵ is absurd. Certainly if AT&T retains its classification as dominant with a market share of over sixty percent, as it properly does, BOCs should continue to be classified as dominant with local access market shares near one hundred percent.¹⁶

¹³Experience in other markets has demonstrated that a failure to appreciate that distinction can be devastating. See William G. Shepherd, Potential Competition Versus Actual Competition, 42 Admin. L. Rev. 5, 26-28 (1990) (discussing the control of single airlines over bottleneck facilities -- slots available in hub cities -- as a barrier to effective competition and one reason for the failure of airline deregulation).

¹⁴Were local markets as competitive as the Petition suggests, BOCs would not be able to continue to utilize pricing to disadvantage interexchange customers and CAP competitors. For example, Southwestern Bell has increased the price of its dark fiber offering by 92% over the last two years. 1993 Annual Access Filings, Memorandum Opinion and Order, CC Docket No. 93-193, ¶ 50 (June 23, 1993) (citing Petition of MCI). That action is difficult to characterize as other than an attempt to price a product used by IXC's, or CAPs, beyond their reach and force all carriers, regardless of their provisioning needs, to purchase DS-3 services. WilTel also notes that the existing regulatory structure has, thus far, not prevented Southwestern from engaging in this conduct. Id. ¶ 53 (declining to suspend or investigate increase).

¹⁵Petition at 38.

¹⁶The Commission views domestic interstate interexchange services as comprising a single product market. Competitive Carrier Services, Fourth Report & Order, CC Docket No. 79-252,

Moreover, the safeguards suggested by the Petition are clearly insufficient to justify the entry of BOC monopolies into the interLATA market.¹⁷ The Commission's experience with regulating and monitoring equal access, price caps and open network architecture cannot be imported uncritically to a context where large LECs would suddenly face an enormous incentive, and the ability, to engage in discriminatory self-dealing and cross-subsidization. Price caps and other accounting measures do not guarantee the BOCs will pay the same amount for access as competitors, even assuming regulations are in place that would give "equal payment" for access any meaning. Further, disregarding the difficulties of ensuring equal payment, a BOC could substantially increase access costs, or decrease the price of its own IXC offering to cost or below, and, because it is a monopolist, not suffer long term harm. In contrast, an IXC without a highly profitable monopoly to support its business could be devastated by such tactics. Obviously, the resources that

95 FCC 2d 554, 564 (1983), vacated on other grounds sub nom. American Telephone and Telegraph Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, 1993 U.S. LEXIS 4392 (June 21, 1993). However, each local service area represents a separate bottleneck which gives a BOC the ability to disadvantage interLATA competitors. Thus, the division of the BOCs into geographic regions does not significantly diminish their individual market power.

¹⁷The existing regulatory measures cited by the Petition include those relating to equal access, Petition at 28, network information disclosure, id. at 31, customer proprietary information, id. at 32, non-structural safeguards, id. at 34, and price caps, id. at 35.

would be required to establish that local monopolists were not engaging in anticompetitive conduct would be daunting, even with additional safeguards such as structural separation and a clear definition of access.¹⁸

Finally, BOC entry into the interLATA market will necessitate a reexamination of complex regulatory issues, some of which, such as long term switched transport rate structures, have not yet been fully resolved. For example, competitive concerns raised by volume discounting of transport rates take on a new dimension where LECs might be able to employ such discounts to clear the market of a substantial number of IXC competitors. And although the Petition implies declining to endorse BOC entry borders on the unpatriotic,¹⁹ it is far from clear such an action would be in the public interest.

III. CONCLUSION

The rulemaking requested by the BOC Petition would be an undertaking of immense complexity. WilTel does not intend to

¹⁸Using the practices of other BOCs as benchmarks to provide a check against unjust discrimination or unreasonable pricing would be effective only if the other BOCs acted properly and filed accurately.

¹⁹Petition at 14 (promising lower prices and an "explosion" of new services); id. at 24. Of course the most direct way to achieve lower long distance rates would be for the LECs to simply lower access charges. Further, it is not clear what the new services promised involve, beyond BOC offered vertically integrated telephone service.

suggest by the above discussion that all inquiry should cease. Rather it emphasizes that simplistic analysis should not obscure the dimensions of the task, and that those dimensions counsel serious and informed consideration of whether this issue is in fact ripe for affirmative regulatory action. WilTel submits that such an inquiry will reveal it is not. However, should the Commission embark upon this task it should do so with full awareness of its scope.

WILTEL INC.

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CERTIFICATE OF SERVICE

I, Diana Neiman, hereby certify that on January 30, 1993, a copy of the foregoing "Comments of WilTel, Inc." to the Petition for Rulemaking to Determine the Terms and Conditions under which Tier 1 LECs should be Permitted to Provide InterLATA Telecommunications Services, R.M. No. 8303, was sent by first class mail, postage prepaid, to the following:

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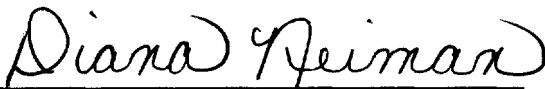
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